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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 149

JAMES W. HARLOW AND CHARLES E. WILSON,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1–26) is reported at 301 F. 2d 361.

JURISDICTION

The judgment of the court of appeals was entered on April 4, 1962. A petition for a rehearing was denied on April 30, 1962 (R. 1781). The petition for a writ of certiorari was filed on May 29, 1962. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioners were "person[s] acting for or on behalf of the United States" amenable to prosecution for bribery under 18 U.S.C. 202.

2. Whether the substantive offenses charged under 18 U.S.C. 202 were committed "out of the jurisdiction of any particular State or district" so as to justify laying venue at the place where petitioners were found under 18 U.S.C. 3238.

3. Whether the government was guilty of deliberate and unnecessary delay in bringing this case to trial, to the prejudice of petitioners.

4. Whether the conspiracy charge was alleged with sufficient specificity to enable the defendants to prepare a defense.

5. Whether the conviction of the petitioner Harlow for conspiracy was subject to reversal because the government's evidence showed the existence of a possible unrelated conspiracy in which he was not involved.

6. Whether letters seized under a search warrant should have been suppressed, and the subsidiary questions:

a. Whether, in the absence of the underlying affidavit, certified to have been lost, there was sufficient evidence of probable cause for issuance of the warrant;

b. Whether there was sufficient evidence of independent leads, untainted by alleged mail interception, to the information supporting issuance of the warrant;

c. Whether the warrant described the letters with sufficient particularity.

7. Whether petitioners were prejudiced by the admission of purported hearsay evidence.

STATUTES AND RULE INVOLVED

Section 202 of Title 18, U.S.C., provides:

> Whoever, being an officer or employee of, or person acting for or in behalf of the United States, in any official capacity, under or by virtue of the authority of any department or agency thereof, or an officer or person acting for or on behalf of either House of Congress, or of any committee of either House, or of both Houses thereof, asks, accepts, or receives any money, or any check, order, contract, promise, undertaking, obligation, gratuity, or security for the payment of money, or for the delivery or conveyance of anything of value, with intent to have his decision or action on any question, matter, cause, or proceeding which may at any time be pending, or which may by law be brought before him in his official capacity, or in his place of trust or profit, influenced thereby, shall be fined not more than three times the amount of such money or value of such thing or imprisoned not more than three years, or both; and shall forfeit his office or place and be disqualified from holding any office of honor, trust, or profit under the United States.

Section 3238 of Title 18, U.S.C., provides:

> The trial of all offenses begun or committed upon the high seas, or elsewhere out of the jurisdiction of any particular State or district, shall be in the district where the offender is found, or into which he is first brought.

Rule 48 of the Federal Rules of Criminal Procedure provides in pertinent part:

> (b) If there is unnecessary delay in presenting the charge to a grand jury or in filing an

information against a defendant who has been held to answer to the district court, or if there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, information or complaint.

STATEMENT

An indictment returned on April 19, 1957, in the United States District Court for the Western District of Texas, accused petitioners, former civilian employees of the European Exchange System (hereinafter designated as EES), an organization operating "post-exchanges" for United States personnel in Europe, of soliciting and receiving bribes and kickbacks from vendors supplying EES in Europe. Count I of the indictment charged that, between 1950 and 1954, in San Antonio and various points in Europe, petitioners, together with one Addy and one Port,[1] conspired among themselves and "other persons to the grand jury unknown" (in violation of 18 U.S.C. 371) to defraud the United States of its rights to have the business activities of EES honestly administered, to have the contracts of EES for purchases of merchandise honestly awarded, and to have the honest services of EES employees. Counts II and III charged the petitioner Wilson with soliciting bribes on two occasions in 1953 from Robert T. McLane, a representative of EES suppliers; and Counts IV through IX charged the petitioner, Harlow, with receiving bribes

[1] Port died prior to trial. Addy was convicted with petitioners but the court of appeals reversed his conviction on the ground that there was insufficient evidence to convict him of the conspiracy charged.

in 1952 from McLane and one Henrik Emborg (another supplier), in violation of 18 U.S.C. 202. Each of the substantive counts alleged that the offenses were committed out of the jurisdiction of the United States and that the defendants, since the commission of the acts charged, had returned to the United States, resided in San Antonio, and, on the date of the indictment, were found in the Western District of Texas. (R. 2–19.)

After a jury trial commencing on June 6, 1960, the defendants were convicted (R. 1273 *et seq.*). On February 14, 1961, petitioner Harlow was sentenced to pay a $10,000 fine and to serve a total term of imprisonment of eleven years—(five years on Count I, three years on Count IV to run consecutively to the sentence imposed on Count I, three years on Count V to run consecutively to the sentence on Count IV, and three years on each of the Counts VI through IX, to run concurrently with various sentences imposed on the prior counts). On the same day, petitioner Wilson was sentenced to serve a total term of imprisonment of eight years (five years on the conspiracy Count I, three years on Count II to run consecutively with the sentence on Count I, and three years on Count III to run concurrently with the sentence on Count II). (R. 1279).

On appeal, Harlow's conviction was affirmed on all counts. The conviction of the petitioner Wilson was affirmed as to the substantive counts, but reversed as to the conspiracy count on the ground that he had previously been convicted (in March, 1954) before the United States Court of the Allied High Com-

mission for Germany for the same offense. (R. 1748–1774.)[2]

THE EVIDENCE AT THE TRIAL

Briefly, the government's evidence revealed a scheme whereby petitioner Harlow, as Chief of the Food and Services Branch of EES in Germany (with authority to negotiate for purchases from vendors throughout Europe) and petitioner Wilson, his assistant and subsequently his successor, induced vendors to pay them for the award of contracts with EES. The suppliers made the payments by transferring funds into numbered bank accounts in Switzerland.

The proof was developed mainly through the testimony of two representatives of vendors—McLane, who testified that, under instructions from petitioners, he transferred about $200,000 into numbered accounts (and in addition delivered cash payments)—and Emborg, who testified that he deposited in such accounts some $35,000 to $45,000. Their testimony was corroborated by bank confirmations, by letters from Harlow to Wilson and McLane (alleged as overt acts in the conspiracy count), by recordings of conversations between Wilson and McLane made when McLane was cooperating with government investigators, and by the testimony of the government investigators.

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[2] Without conceding the correctness of this holding (see *Bartkus* v. *Illinois*, 359 U.S. 121; *Abbate* v. *United States*, 359 U.S. 187), we have acquiesced in the result, inasmuch as Wilson's conviction was sustained on the substantive counts. As to the executive policy in matters of this kind, see note 3, *infra*.

HISTORY OF THE CASE

The criminal conduct here charged was first suspected by EES authorities in Europe in 1951–1952. An investigation ensued and, in 1954, at a time when the petitioner Harlow had returned to the United States, Wilson was charged and convicted before the United States Court of the Allied High Commission for Germany of conspiring with Harlow and others to receive bribes from persons selling merchandise to the EES in violation of the Laws of the Allied High Commission. Wilson was sentenced to serve six months but was released before completing his sentence on his promise to cooperate with the authorities in further investigation of the bribery scheme.[3]

In the United States, a grand jury investigation was initiated in June 1956. The grand jury was recessed while the government sought the records of Swiss banks into which the petitioners had caused the bribe money to be deposited—records which had been denied the investigating military authorities. The Swiss banks resisted the efforts of the United

[3] Though no double jeopardy obstacle prevents it, the Department of Justice does not normally institute further prosecution for the substantive offense when a conviction has already been obtained on a conspiracy charge, based on the same facts. And this is true even when, as here, the Department of Justice did not control the initial prosecution. But it has always been recognized that this policy of the Department is subject to exceptions. This is such a case. Wilson's sentence in the Commission Court was minimal and he did not serve it all. Moreover, had his punishment ended there, it would have been unjustly disproportionate to Harlow's.

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States government and litigation ensued, including appellate proceedings. Efforts to get the records having failed, the grand jury resumed consideration of the matter in April 1957 and returned the instant indictment.

Following the return of the indictment, the United States government continued its efforts to obtain the Swiss bank records. It was not until March 25, 1959, that the Attorney General was advised by Swiss authorities, through the State Department, that the appellate courts of Switzerland, because of Swiss banking secrecy statutes, would not permit the records to be produced. Promptly thereafter, the government took steps to have petitioners arraigned (on June 30, 1959) and to have a time set for the filing of motions.

On July 30, 1959, petitioners filed numerous motions, including motions for bills of particulars and a motion for the production of documents. On August 25, 1959, the government filed a memorandum in opposition to the motions and on October 29, 1959, it voluntarily filed a bill of particulars. On March 23, 1960, the district court overruled all the motions, except that it ordered the government to produce all papers taken from Wilson in Nürnberg, Germany, on September 8, 1953, by Army investigators and police. The court set the case for trial on June 6, 1960, "emphasiz[ing] that, due to the long pendency of the case and the court's own calendar it is essential that the case be tried when indicated and that no continuance be considered." Thereafter, and up to the date of the trial, petitioners filed several addi-

tional motions for the production of documents.

The trial began on June 6, 1960, as scheduled, although on that morning the petitioners filed a "Not Ready Announcement and Renewal of Laches Motion." During the trial, the court, in commenting on defense protestations about delay, said (R. 845):

> There are many things that caused that. You had a judge to die down here, you had two judges sick, and Judge Rice, of course, had a serious operation, and Judge Thomason has been sick. The other judges that were assigned over here, something happened when they got over here, so it has just been one of those things with regard to the time that has elapsed but anyway we are going to do the best we can about it; so I will overrule the objection.

ARGUMENT

1. The argument that petitioners were not subject to 18 U.S.C. 202 (Pet. 2, 19–22) is refuted by the language and history of the statute. Section 202 applies to "an officer or employee of, or person acting for or in behalf of the United States in any official capacity, under or by virtue of the authority of any department or agency thereof," and petitioners' employment contracts, while negating their status as federal employees, expressly recognizes that EES "is an instrumentality of the United States government and is an organization of the Department of the Army." On the face of it, petitioners would seem to fall within the statute as individuals "acting for or on behalf of the United States."

There is no reason to suppose these words were used in any technically restrictive sense. On the contrary, an examination of the provision as a whole shows it to be broadly inclusive. As noted by the Court of Appeals for the Fourth Circuit in *Wilson* v. *United States,* 230 F. 2d 521, 524, certiorari denied, 351 U.S. 931, the grammar and phraseology alone, the number of broadening words used and the number of disjunctive or alternative persons, actions, or situations referred to indicate that wide coverage was intended.

This construction is supported by extraneous evidence. The Reviser's Notes plainly say that Sections 201 and 202 were changed, in conformity with the apparent legislative intent, to cover ramifications of the executive branch not foreseen at the time of the adoption of the 1909 Criminal Code. Thus, the Note to Section 202 states that the words "or agency thereof" were substituted for previous phrasing "or office of the Government thereof" to "clarify the meaning of this section and further effectuate the apparent intent of Congress to include within its scope all government bodies." And a similar Note to the companion Section 201 (prohibiting offers of bribes), which also applies to Section 202, explains the change in wording as designed to embrace all officers or persons acting on behalf of independent agencies or government-owned or controlled corporations in furtherance of "what appeared unquestionably to be the intent of Congress, namely, to cover all persons acting for the United States Government in an official function." The Note under 202 makes a further cross-

reference to Section 6 of the Title, which defines "agency" as including "any department, independent establishment, commission, administration, authority, board or bureau of the United States or any corporation in which the United States has a proprietary interest, unless the context shows that such term was intended to be used in a more limited sense." These indications fully justify the Court of Appeals' conclusion that petitioners were "person[s] acting for or on behalf of the United States" within the meaning of this protective legislation.

Moreover, in ruling on their immunity from state taxation this Court has characterized post exchanges as "arms of the Government deemed by it essential for the performance of governmental functions" and "integral parts of the War Department." *Standard Oil Company* v. *Johnson,* 316 U.S. 481, 485. This case has been relied upon by lower courts as decisive of the status of an Army exchange as a federal agency in other areas, *e.g.*, see *Daniels* v. *Chanute A.F.B. Exchange,* 127 F. Supp. 920 (E.D. Ill.) (the Tort Claims Act), and decisions cited therein.[4] With greater rea-

[4] No purpose would be served here by attempted matching of the numerous decisions cited by petitioners as being in conflict with the decision below or as representing purported ambivalence of the government's position as to the status of non-appropriated fund activities (Pet. 19–22). The only such case in this Court, *United States* v. *Krichman*, 256 U.S. 363, was decided in 1921 under the language of Section 201 as it formerly read. It held that a baggage porter in a station of a railroad operated by the United States under the railroad control legislation of World War I was not a person acting for the United States in an official function. Apart from the time of the decision, the difference in the duties performed by petitioners would make that case inapposite.

son, an Army exchange should be included as a federal agency for the purpose of the bribery statute, which has an intentionally broad protective reach.

2. Petitioners' venue objection (Pet. 5, 33–35) is clearly without foundation. Since 18 U.S.C. 3238 provides that the trial of all offenses committed "out of the jurisdiction of any particular State or district" shall be in the district where the offender is found or first brought (see p. 3, *supra*), and the substantive offenses were alleged to have been committed wholly in Germany, petitioners are forced to contend that the territory under the jurisdiction of the United States Court of the Allied High Commission for Germany was a "district" within the meaning of Section 3238 so that the High Commission Court had exclusive jurisdiction to try them for the violations of 18 U.S.C. 202. But there are two insuperable obstacles.

In the first place, the "district" contemplated by Section 3238 means a judicial district as established by Congress, in which there is a regularly organized court having jurisdiction over all offenses made punishable by the laws of the United States. See *Jones* v. *United States*, 137 U.S. 202; see also 28 Op. Atty. Gen. 24. The High Commission Court (comprehensively discussed in *Madsen* v. *Kinsella*, 343 U.S. 341) does not fit that description. It partakes of the nature of a military tribunal created under the executive branch with constitutional authority stemming from the President. Moreover, the Commission Court could not have tried petitioners on the charges presented here. That court, designed to meet the special needs of law enforcement in occupied ter-

ritory, was given jurisdiction over all non-military persons in the area of control with relation to acts transgressing the laws of the Commission or the laws of the territory.[5] Thus, while the court undeniably had jurisdiction to try petitioners for certain offenses, it could not try violations of United States laws, including 18 U.S.C. 202.[6] The offenses charged against petitioners—violations of the laws of the United States—having been committed outside of "any particular State or district", petitioners were properly charged and tried in the state of Texas where they were found. See *United States* v. *Newth*, 149 Fed 302 (D.C.W.D. Wash.).

3. Petitioners' claim that they were denied a speedy trial (Pet. 6-7, 40-42) was properly rejected. The court below unanimously found that there was no "unnecessary" or "unreasonable" delay which might have violated petitioners' rights under the Sixth Amendment or Rule 48(b) of Federal Rules of Criminal Procedure.[7] From the date of the initial investi-

[5] The High Commission Court was given jurisdiction over:

(i) All offenses against the laws and usages of war.

(ii) All offenses under any proclamation, law, ordinance, notice or order issued by or under the authority of the Military Government or of the Allied Forces.

(iii) All offenses under the laws of the occupied territory, or of any part thereof.

See 12 Fed. Reg. 2190-2191. See also *Madsen* v. *Kinsella*, 343 U.S. 341, 364.

[6] The prior conviction of the petitioner Wilson in the High Commission Court was for a conspiracy to receive bribes in violation of the Laws of the Commission.

[7] The only difference of opinion in the court was as to whether undue delays in filing the formal charge may, under some circumstances, violate the right to a speedy trial.

gation to and after the date of the indictment in 1957, the government was making a bona fide effort to obtain bank records which might have been of crucial importance. Petitioners were promptly arraigned in June 1959, soon after the government was finally apprised that the records would not be available. The first series of petitioners' numerous motions were filed in July 1959 and were answered by the government within a month. The delay in ruling on the motions until March 1960 was probably caused by the unavailability of judges, referred to by the trial judge (*supra,* p. 9). Under these facts, we submit the prosecution was not unduly delayed. "The right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances." *Beavers* v. *Haubert,* 198 U.S. 77, 87.

In any event, the delays were not "purposeful or oppressive." See *Pollard* v. *United States,* 352 U.S. 354, 361. There was no intent to prejudice petitioners' defense. Nor did any real prejudice result from the lapse of time between the offenses and the trial. The facts were essentially simple despite the complicated presentation which petitioners make here. The government's evidence on direct examination (see Statement, *supra,* p. 6) is contained in only 241 pages of the more than one thousand pages of trial transcript (covering for the most part arguments on objections to admissibility of evidence). The essential proof was developed through the testimony of two witnesses, McLane and Emborg, who had paid the bribes pursuant to the conspiratorial arrangement. Petitioners must have known what this testi-

mony would be since they had access to government exhibits, including the transcript of the trial of the petitioner Wilson before the Allied High Commission. The only defense testimony offered was character evidence. Petitioners made no showing of any significant evidence relating to the charges proved which became unavailable because of the delay. Had they been concerned, they might have moved for an early trial. Though reluctantly, the Government was prepared to go to trial sooner. (See R. 37.) Petitioners only raised the issue a month after arraignment, when the trial was imminent. And, even then, they did not ask for a speedy trial, but sought dismissal of the prosecution on the ground of laches. Their complaint came too late. *See United States* v. *Lustman*, 258 F. 2d 475 (C.A. 2), certiorari denied, 358 U.S. 880.

4. There is no merit to the contention (relevant here only as to petitioner Harlow) that the indictment for conspiracy was too vague and indefinite to enable the defendants to prepare a defense (Pet. 4–5, 24–30). The indictment charged a plan to defraud the United States in three specified particulars: (1) the right to have the exchanges in Europe honestly administered free from collusion between employees and persons seeking to sell merchandise to the agency; (2) the right to have EES contracts awarded in an honest manner free from solicitation of money by employees from vendors as bribes, kickbacks and commissions; and (3) the right to the honest service of its employees, free from corruption, partiality and improper influence (R. 2 *et seq.*). The indictment specifically

alleges the defendants agreed that they would inform McLane, Emborg and others that contracts would be awarded to their firms only if they would split their sales commissions with the defendants; that they would lead McLane, Emborg and the others to believe that a group of EES employees known as "the organization" had control of the award of contracts and that Harlow would retain control of the organization even after his resignation; that they would impede EES from competitive bidding; and that they would cause vendors or their agents to pay money into numbered bank accounts. The count further set out in detail 21 overt acts, reciting verbatim the contents of letters from Harlow to Wilson. Petitioners were thus adequately informed of the charges against which they were called upon to defend. If they were in any doubt that principal witnesses against them would be the vendor-agents McLane and Emborg, that doubt could not have survived the bill of particulars, filed voluntarily by the government. It told the defendants that the persons who had been caused to place money into numbered bank accounts were McLane and Emborg (R. 39–42). Moreover, the bill supplied details of evidence. It set forth the numbers of the bank accounts, the names and locations of the banks, and the dates and amounts of money paid, listing 14 items paid by Emborg and 4 items paid by McLane. It further supplied the names of vendors represented by Emborg and McLane, the type of merchandise sold, and other particulars relating to overt acts.

Nothing in this record supports the assertion that the government withheld significant information from

the defendants (Pet. 28). The government proved its case without the aid of the "other persons [co-conspirators] to the Grand Jury unknown". No other vendors or agents (*i.e.*, other than McLane and Emborg as agents) were produced at trial. The identity of members of the "organization" (the alleged group of corrupt EES employees), was of no concern to petitioners. It was referred to in the indictment only in reciting a representation that the defendants allegedly made to vendors in forcing compliance with their demands. The only alleged members of the "organization" testifying at trial were the government investigators Stewart and Bray who had pretended to infiltrate the group; their testimony as to specific "organization" activities affected only the defendant Addy.

Nor does the record support the accusation that the trial court failed to enforce its orders that the government produce "certain documents" before trial. These "certain documents" are not identified. The government not only complied with the orders of the court, but granted several direct requests of the defendants, furnishing addresses of government witnesses[8] and Department of Defense contract files without being so ordered (R. 85–90).

5. The claim (Pet. 4–5, 30–33) of prejudicial variance because of the alleged proof of two conspiracies (relevant only as to petitioner Harlow) is without

[8] The court found it necessary to state in a letter, addressed to the clerk and counsel, that while the defense was entitled to visit with prospective government witness, the witnesses could not be harassed or compelled to talk with counsel (See R. 101, 247, 1106).

merit. The court below, in reversing the conviction of the co-defendant Addy, held that there was no competent evidence to connect him with the conspiracy charged. Noting however that the investigators Bray and Stewart did testify that, in attempting to work their way into the "organization", they had carried out certain transactions with Addy, the court observed that "[a]t most, the Government established the existence of two separate conspiracies"—one involving Harlow, Wilson and others, the other Addy, Stewart and Bray (Pet. App. 9–10). Assuming the existence of two such conspiracies, the court found no variance affecting substantial rights (Pet. App. 11). Since the proof as to the possible second conspiracy did not implicate petitioners and since it was minor in relation to the overwhelming proof of petitioners' guilt, the court below properly found no prejudice to petitioners.

6. At trial, a great deal of time was consumed in hearing arguments and testimony as to the admissibility of certain letters seized in 1953, pursuant to a search warrant, at the Nürnberg apartment of the petitioner Wilson, arguments which are renewed here (Pet. 3, 22–25). The letters were addressed to Wilson from petitioner Harlow. One advised Wilson that there was "[n]o basic changes in original plans" (R. 695); one instructed him, in the event of "stalling" or "excuse" to "revert to the old method" (R. 698); some gave instructions which Wilson was to follow with respect to the "horseman" and the "fisherman", names by which the

vendors McLane and Emborg were known (R. 688–699; 302; 956).

a. The admissibility of the letters was first raised in a motion to suppress filed by Wilson before trial, attacking the search warrant as not being supported by an affidavit (R. 126).[9] The court indicated that it would grant the motion on that ground (R. 126). But when the government represented that, though the affidavit (recited in the warrant as having been presented) could not be found, the Chief Judge of the High Commission Court would testify as to his basis for issuing the warrant, the trial court agreed to hold the matter in abeyance (R. 137; 424–426).

During the trial, a hearing was held in chambers outside the presence of the jury. Former Judge Turmo of the High Commission Court testified (R. 537–557) that he remembered the occasion of issuance well because Wilson was an acquaintance. He was positive that an affidavit had been filed and thought it had been signed by the prosecutor Canfield. In addition, the allegations of the affidavit were substantiated before him by the oral testimony of a warrant officer, Coleman, who had personally investigated the transactions of Wilson. He had ruled that probable cause existed for the issuance of search and arrest warrants. The Army investigator Coleman testified that he had turned over to Canfield statements taken from McLane and Emborg, and that he and Can-

[9] Below, it was questioned whether standards for the issuance of search warrants are, or need be, the same in the territory of the Allied High Commission for Germany as in the United States. For the purpose of this argument, we assume that they are, without, however, waiving the point.

field had prepared the affidavit for the warrant.[10] He had testified before Judge Turmo, giving the details of his investigation (R. 599–608). Finally, Government counsel apprised the trial court that he had under seal the certificate attesting that the affidavit was a lost document.[11] After the court informed counsel that it was going to overrule the motion to suppress (R. 652–653), defense counsel noted objections to the warrant (R. 655½) including a claim that the letters could not properly be the object of a search (R. 655½-656).

Thereafter on June 10, the letters were introduced at trial during the testimony of the investigator who executed the search warrant (R. 686 *et seq.*)

b. On the following Monday, June 13, at the beginning of the afternoon session of trial, defense counsel approached the bench to ask that the question of illegal search and seizure be reopened. Counsel stated that a talk with the former civilian investigator, Bray (a government witness), had revealed that the peti-

[10] The former prosecutor, Canfield, later testified (R. 880–888) that he had filed the application for the warrant on the basis of information furnished him by McLane and Emborg through oral conversation and in written statements. He had signed the affidavit which related that Wilson had received, in connection with his duty as a member of the Occupational Forces, some $200,000 from McLane and $30,000–35,000 from Emborg through numbered bank accounts in Switzerland. He confirmed that Coleman had testified orally before Judge Turmo in support of the issuance of the warrant.

[11] Government counsel left the room briefly and returned with the certificate. When defense counsel asked to take the certificate for the purpose of checking it against the Rules, government counsel indicated that he would prefer to have a copy made (R. 611–612.)

tioner Wilson's mail had been intercepted and photostated by government agents, and that the information which led to the interviews with the vendors McLane and Emborg, and to the search of Wilson's home, was derived from this illegal mail interception (R. 806–807). The court reserved its ruling while the trial proceeded (R. 808).

During the afternoon cross-examination of the witness McLane, defense counsel asked him if he had ever before seen the Harlow-Wilson letters (R. 852–853). McLane said that he had never seen the letters or any copy of them, although he had been told about one. He thought that Warrant Officer Coleman and civilian investigator Stewart, on the day he had agreed to cooperate with them, had shown him some letters which they said they had intercepted from the mail—some of which were addressed to him. They said that this was how they had obtained information (R. 852–861).

On the same afternoon, June 13, defense counsel produced former civilian investigator Bray as a witness in chambers (R. 889–908). He testified that, during his investigation of EES irregularities he instigated a mail intercept system with the approval of the commanding officer, General Swartz, and with the help of Warrant Officer Coleman and civilian investigator Stewart. He said the system covered all mail delivered to Wilson. As to the Harlow-Wilson letters in evidence, he said he specifically remembered having read a copy of one of them before it was delivered to Wilson, and that he had used it to open the interrogation of the vendor, McLane.

Warrant Officer Coleman testified in chambers that he recalled no interception of any mail of Wilson or of any other defendant,[12] that he never saw a request therefor, and that the civilian Bray could not have ordered it since such a request would have had to go through Army intelligence (R. 918–923). Neither General Swartz nor a colonel serving under him remembered a request for an interception of the mail of Wilson (R. 947, 952–953), although the general vaguely recalled having seen some correspondence dealing with transactions of the defendants which was "purported" to have been intercepted (R. 947, 949).

Coleman's fellow investigator, Warrant Officer Taylor, and their superior, a major, testified that, to their knowledge, no interception of the mail of the defendants was ever authorized or conducted (R. 968, 974). The prosecutor of the High Commission Court, Mr. Canfield, who had made a thorough review of the investigation, had never heard of such an interception (R. 940–941). He testified that in applying for a search warrant in Nürnberg, he used no information that was based upon mail interception (R. 941).

Warrant Officer Coleman further testified in chambers (R. 914–932) that his first lead to the investigation of McLane was a letter (received in evidence, R. 933) sent to the United States Federal Bureau of

[12] Warrant Officer Coleman testified that there was a cover (*i.e.*, a check of the names of senders) put on McLane's mail but that he did not recall confronting McLane with any letters while interviewing him. The officer's superior confirmed the fact of a cover on McLane's mail (R. 968).

Investigation from Holland by one Jules Hoogervorst and thereafter transmitted to his investigative unit. In January 1953, Coleman went to Amsterdam to see Hoogervorst who explained that he could not understand how a United States citizen (McLane) "was making all these money transfers into Swiss banks" when he was employed by Dutch firms. Hoogervorst said he could get documents to prove that McLane was shipping out some $4,000 or $5,000 a month to a Swiss bank. In February 1953, Hoogervorst produced the documents (also introduced into evidence). It was then, in February, that Coleman first discussed a mail cover which was arranged only with respect to McLane's mail. He had never discussed mail interception with anyone prior to the time he received the information from Hoogervorst, and only McLane's mail was intercepted. He did not recall having confronted McLane with mail during his interview.

During argument, the court indicated its tentative view (R. 998–1002) that an unconstitutional interception of the petitioner Wilson's mail had tainted the government's evidence with illegality. The court made clear however that this was not its ruling (R. 989, 1003); and it gave counsel time until the next morning to submit authority for their respective positions (R. 1003, 1013).

On the following day, the court announced in chambers that, after careful consideration of the evidence and authorities in connection with the reopened motion to suppresss, it was denying the motion (R. 1015). The court said that, while the testimony indicated that unconstitutional letter interception

had taken place, it was "equally clear that all evidence presently being introduced was obtained as a direct result of an origin wholly independent of the unlawful interception in question."

The factual issues, as to the existence of an affidavit and its derivation from sources independent of a mail search, were resolved against petitioner by the trier of fact after full consideration. His conclusions, amply supported by the evidence, present no issue for review.

c. The argument that the warrant did not describe the papers to be seized with sufficient particularity does not survive a reading of the warrant itself. Indeed, the warrant recites the objects of the search as "records, documents, and written communications between persons named Harlow, Emborg, McLane, Sokolow, Wilson, Ross, Richards, and Addy and written evidence of Swiss bank deposits, withdrawals and accounts." Nor does the suggestion that the letters were not susceptible of seizure deserve extended discussion. The letters described and seized were used by Harlow and Wilson to carry out the crime and were therefore subject to seizure. See *Harris* v. *United States*, 331 U.S. 145; *Clay* v. *United States*, 246 F. 2d 298 (C.A. 5), certiorari denied, 355 U.S. 863.

7. The contention that hearsay evidence was improperly admitted (Pet. 6–7, 35–40) is clearly without merit.

A witness may properly refresh his recollection from any document that serves to refresh such recol-

lection, regardless of whether the document is admissible. See Wigmore, *Evidence* (3rd ed.) § 758, discussing "present recollection revived". McLane's testimony giving dates and amounts of specific money transfers, refreshed from a bank memorandum (Item 1, Pet. 35–36), was thus clearly proper. Moreover the memorandum itself would have been admissible since McLane testified that he knew that the document correctly recorded the facts at the time it was received by him. See discussion of "past recollection recorded" in Wigmore, *Evidence* (3rd ed.), § 734 *et seq.;* See also McCormick, *Evidence,* pp. 14–18.

The letters written to the petitioner Harlow relative to the conspiracy (Items 2 and 4, Pet. 36) were clearly admissible. The letters were identified by the writers and their proper mailing raised a presumption of receipt by petitioner. Wigmore, *Evidence* (3rd ed.), § 95.

The ledger sheets from Emborg's office prepared under his supervision and his sample copy of the regular request for a transfer of bank funds (Items 3–6, Pet. 36)—made in the regular course of business—were admissible on familiar grounds. See the Federal Business Records Act, 28 U.S.C. 1732. The same is true of the bank confirmations (Item 5, Pet. 36), trustworthy as documents duly accepted as routine in the commercial world, and here established as authentic by the testimony of receipt in the mail in each instance immediately after the transfer was directed. Compare *Zacher* v. *United States,* 227 F. 2d 219 (C.A. 8), certiorari denied, 350 U.S. 993.

Moreover, even if some of this evidence were of questionable admissibility, it was merely cumulative, not only of the direct testimony of the bribe-givers, but of evidence supplied by the recordings, the other documents and the testimony of the investigators.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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